"WE'LL KNOW IT WHEN WE SEE IT":

THE CONCEPT OF GOOD CAUSE

FOR FAILURE TO SUPPLEMENT DISCOVERY RESPONSES UNDER

THE TEXAS RULES OF CIVIL PROCEDURE

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INTRODUCTION TO TEXAS RULES OF CIVIL PROCEDURE 166B(6).

Texas Rule of Civil Procedure 166a(6) sets forth a party's duty to supplement discovery responses and the consequences for failure to do so.

6. **Duty to Supplement.** A party who has responded to a request for discovery that was correct and complete when made is under no duty to supplement his response to include information thereafter acquired, except the following shall be supplemented no less than thirty days prior to the beginning of trial unless the court finds that good cause exists for permitting or requiring later supplementation. a. A party is under a duty seasonably to supplement his response if he obtains information upon the basis of which:

1. he knows that the response was incorrect or incomplete when made;

2. he knows that the response though correct and complete when made is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading: or

b. If the party expects to call an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name, address and telephone number of the expert witness and the substance of the testimony concerning which the expert witness is expected to testify, as soon as is practical, but in no event less than thirty (30) days prior to the beginning of trial except on leave of court.

On its face, the foregoing rule seems to be relatively straight forward. A Party must supplement its discovery responses (interrogatories, production and admissions) seasonably unless the newly acquired information is not merely cumulative with what has already been disclosed. The duty to supplement is an affirmative one. *Boothe v. Hausler*, 766 S.W.2d 788, 789 (Tex. 1989). The requirement of supplementation is mandatory, unless good cause is shown for late supplementation. The purpose of the Rule is laudable. The Supreme Court's intention was "to encourage full discovery of the issues and facts prior to trial so that parties could make realistic assessments of their respective positions. It was [their] hope that this would facilitate settlements and prevent trial by ambush." *Rainbo Baking Co. v. Stafford*, 33 Tex. Sup. Ct. J. 32, 33 (October 11, 1989). (A copy of this opinion is attached as Exhibit "A"). In spite of the seeming simplicity of the rule, it is not as simple as it looks.

I. THE CONSEQUENCES OF FAILURE TO TIMELY SUPPLEMENT DISCOVERY RESPONSES ARE SEVERE. Virtually every reported case addressing failure to seasonably supplement

discovery responses had dealt with identification and designation of persons with knowledge and expert witnesses. However, the same principal applies to other forms of discovery. Simply stated "[a] party who breaches the duty to supplement an interrogatory loses the opportunity to offer the testimony of a witness who is a subject of the interrogatory . . . " *Rainbo Baking Co. v. Stafford*, 33 Tex. Sup. Ct. J. 32, 33 (October 11, 1989); *Clark v. Trailways, Inc.* 774 S.W.2d 644 (Tex. 1989); *Boothe v. Hausler*, 766 S.W.2d 788 (Tex. 1989). The sanction is automatic and the party opposing the offer is not required to request, or to take a continuance if it is offered. *Guiterrez v. Dallas Independent School District*, 729 S.W.2d 691 (Tex. 1987). A trial court can allow exception to the foregoing rule only when the proponent of the evidence shows good cause to excuse its failure to supplement seasonably. *Id*.; Tex. R. Civ. P. 215(5). **II. WHAT IS GOOD CAUSE?--GOOD QUESTION.**

Texas appellate courts have been very reluctant to find or sustain a finding of good cause for failure to seasonably supplement discovery responses. In *Johnson v. Gulf Coast Contracting Services, Inc.*, the Beaumont Court of Appeals reluctantly affirmed the trial court's finding that there was good cause for late identification of a fact witness. 746 S.W.2d 327 (Tex. App.--Beaumont 1988, writ denied). In *Johnson*, a hearing was conducted outside the presence of the jury wherein it was established that:

Appellee, a Louisiana company, had been inactive since 1983, with no telephone listing since 1985. Appellee was in liquidation, and a search for its president had gone on for months. The president testified that he had not maintained an office at the company's official location since 1983 and that his staff did not associate him with Appellee because he was in Baton Rouge (100 miles away). Appellee's counsel stated that as soon as they found Appellee's president, the information was given to Appellant.

Johnson, 746 S.W.2d at 329. Faced with the foregoing facts, the Beaumont court reluctantly overruled the point of error noting "We cannot conclude that the trial court 'acted without reference to any guiding rules and principles.'" *Id*.

The Dallas Court of Appeals has also sustained a trial court's finding that good cause had been shown such that it would allow the use of a previously undesignated expert. *Ellsworth v. Bishop Jewelry & Loan Co*., 742 S.W.2d 533 (Tex. App.--Dallas, 1987, writ denied). In *Ellsworth*, the Dallas court held that because one of the plaintiff's experts had gone into matters which were not disclosed in an interrogatory response, the defendant had just cause to call a previously unidentified expert for rebuttal testimony.

Numerous courts have refused to find that good cause was established such that failure to timely supplement discovery was excusable. Indeed, the Texas Supreme Court has noted some concern about the paucity of cases in which good cause has been found.

Our goal in promulgating Rules 166b and 215(5) and our prior opinions interpreting these rules was to encourage full discovery of the issues and facts prior to trial so that parties could make realistic assessments of their respective positions. It was our hope that this would facilitate settlements and prevent trial by ambush. Both of our opinions in *Gutierrez* and *Youngblood* state the sanction announced in *Morrow*. However, neither of these cases mention the trial court's discretion in considering the good cause exception. **Strict interpretation of the language in *Gutierrez* and *Youngblood* has caused application of the sanction to be mechanical, leaving no room for discretion. We therefore reaffirm our holding in *Morrow* and once again point out that the sanction of automatic exclusion of testimony of an undisclosed witness is subject to a good cause exception.** If the trial court, in its discretion, finds that good causes exists to allow the evidence, such should be admitted.

Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394, 396 (Tex. 1989)(emphasis added). Because there are so few cases which have found that good cause was established, the only way to describe what constitutes good cause is through inductive reasoning. Therefore, a number of cases which have held that good cause was not established are discussed below.

- In *Rainbo Baking*, the Texas Supreme Court held that the trial court had abused its discretion in allowing an improperly identified witness to testify where the basis for the finding of just cause was that the proponent "expected the case to settle and that [the witness] was first contacted on the day of trial." - The Texas Supreme Court found that the trial court erred in finding that there was good cause to admit the testimony of a witness where the witness was not contacted about testifying approximately 10 days prior to trial, gave no reports other than an initial investigative report [the witness in question was an accident investigation officer for the Mexican Federal Police), and the witness frequently moved to various locations in Mexico following the accident in question. *Clark v. Trailways*, 774 S.W.2d 644, 647 (Tex. 1989). The Supreme Court noted "[t]hese facts, however, do not permit a reasonable inference that [the proponent] was unable to comply with the discovery request by [the opponent] or seasonably supplement its answers to those requests. Lira's testimony fall short of indicating [the proponent's] good faith efforts to locate [the witness] or her inability to anticipate the use of his testimony at trial, which could otherwise support a finding of good cause to permit the testimony of an unidentified witness." - The Texas Supreme Court was not persuaded by arguments that the proponent had no duty to supplement and that it would suffer great harm if the testimony were not allowed into evidence in *Boothe v. Hausler*, 766 S.W.2d 788 (Tex. 1989). - Lack of surprise does not constitute good cause for failing to supplement discovery responses. In *Morrow v. H.E.B.*, Inc., the Texas Supreme Court reversed the court of appeals and affirmed the trial courts refusal to allow a witness to testify where an interrogatory was not supplemented to include the witness' address. Prior to trial, plaintiff set interrogatories to defendant asking for the names and addresses of employees who had come to the aid of plaintiff after the accident. Defendant named the witness in question; however, the only address give was "Missouri." Three weeks prior to trial, defendant located the witness in San Antonio and contacted him by phone; however, it did not supplement its interrogatories. Defendant offered to allow plaintiff to take the witness' deposition prior to his testimony. Additionally, defendant argued that plaintiff would not be surprised. Due to defendant's failure to supplement, the trial court refused to allow the witness to testify. The court of appeals reversed finding that there would have been no surprise to plaintiff and thus the trial court abused its discretion. The Supreme Court reversed. "The court of appeals in its opinion recites much of the evidence which shows there was no surprise. Lack of surprise would show that there was no good cause to exclude the testimony [of the witness]; however, this is the inverse of the standard . . . . It is incumbent upon the part offering the testimony to show good cause why it should be included." *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297, 298 (Tex. 1986). - *Braniff, Inc. v. Lentz* presented the Forth Worth Court of Appeals with an interesting fact situation. Staff Ground Services was a subcontractor of Braniff's. The plaintiff was an employee of Staff Ground Services. The witness in question (Mr. Knoll) was an employee of Staff Ground Services at the time of the accident. The plaintiff called Knoll as his first witness. Defendant objected arguing that Knoll's address had not be disclosed in response to an interrogatory. Plaintiff's counsel responded that it spent two days trying to find Knoll and that he had to hire an investigator to find him. The trial court allowed Knoll to testify. The Court of Appeals reversed the trial court. In his appellate brief, plaintiff further argued that the defendant could not have been surprised because Knoll gave it daily reports for four months which he worked for Staff Ground Services. Based on the facts above, the Court of Appeals reversed holding that good cause had not been established and that the trial court abused it discretion in allowing the testimony. *Braniff, Inc. v. Lentz*, 748 S.W.2d 297 (Tex. App.--Fort Worth 1988, writ denied). - In *Hall Construction Co. v. Texas Industries, Inc.*, the Dallas Court of Appeals held that actual knowledge of a potential witness did not constitute good cause to justify failure to timely supplement discovery responses. In attempting to show good cause, the proponent of the unidentified witnesses argued that neither of the two witnesses had actual knowledge of certain of the relevant facts and that one of the subject witnesses had verified a set of interrogatory responses and the other had executed an affidavit in the cause. The Dallas Court of Appeals reversed and held that no good cause was shown by the proponent. *Hall Construction Co. v. Texas Industries, Inc.*, 748 S.W.2d 533 (Tex.

App.--Dallas 1988, no writ). - "Any argument that appellants' experts were recently discovered is insufficient to constitute good cause." *Stoll v. Rothchild*, 763 S.W.2d 437, 441 (Tex. App.--Houston [14th Dist.] 1988, writ denied). **III. TRIAL CONSIDERATIONS AND TACTICS.**

A. Opposing the introduction of undisclosed evidence or unidentified witnesses.

It should come as no surprise that you must object to the introduction of testimony of an unidentified witness. As the Supreme Court has noted, "[b]y failing to object when an undisclosed witness is offered at trial, a party waives any complaint under rule 215(5) as to the admission of testimony from that witness." *Clark v. Trailways, Inc*., 774 S.W.2d 644, 647 (Tex. 1989). A pretrial motion objecting to a witness will not satisfy the objection requirement. *Id*. This is directly contrary to an earlier (3 months) opinion of the Texas Supreme Court where it stated "The trial court expressly overruled Liberty Mutual's motion to exclude all previously unidentified witnesses under rule 215(5); therefore, error was preserved before the court of appeals as to all four witnesses. *Gee v. Liberty Mutual Fire Insurance Co*., 765 S.W.2d 394, 396 (Tex. 1989). The objection should be reasonably specific. *See Braniff, Inc. v. Lentz*, 748 S.W.2d 297 (Tex. App.--Fort Worth 1988, writ denied). It is probably best to introduce the interrogatory response in question into the record as an exhibit. Alternatively, you should read it into the record in order to properly preserve the error.

B. Making a showing of good cause.

There is some uncertainty as to how a showing of good cause should be made from an evidentiary perspective. The Houston Court of Appeals has intimated that the individual answering the interrogatories is the most appropriate witness to establish good cause. *Walsh v. Mullane*, 725 S.W.2d 263, 264 (Tex. App.--Houston 1986, writ ref'd n.r.e.). However, most other courts have been satisfied, or at least not questioned testimony from an attorney. The Houston court also implied that an expressed judicial finding of good cause was necessary. *Id*. The Fort Worth Court of Appeals seems to have followed the Houston court. *Braniff, Inc. v. Lentz*, 748 S.W.2d 297, 300 (Tex. App.--Fort Worth 1988 writ denied)(" . . . Rule 215(5) requires that the trial court make an affirmative finding of good cause.")(footnote omitted). *Contrast Ellsworth v. Bishop Jewelry & Loan Co*., 742 S.W.2d 533, 734 (Tex. App.--Dallas 1987, writ denied)(holding that an "implied finding of good cause" was sufficient). However, that question has not been squarely addressed. The applicable rules do not seem to require an expressed finding one way or another. Rather, it provides that the proponent bears the burden of establishing good cause and evidence of good cause must be contained in the record. Thus, it appears that a ruling one way or another regarding the testimony will preserve error. Nonetheless, those practicing in Houston and Fort Worth are admonished to review the appropriate case authority.

IV. APPELLATE CONSIDERATIONS.

The standard governing a court's decision to allow or disallow a witness to testify is that of abuse of discretion. This is because the determination of good cause is within the discretion of the trial court. *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297, 298 (Tex. 1986). It is probably not sufficient to assert merely that the trial court erred in admitting or disallowing the testimony. *See Shenadoah Associates v. J & K Properties, Inc.*, 741 S.W.2d 470, 489 (Tex. App.--Dallas 1987, writ denied).

Regardless of whether the testimony is admitted or excluded, you must establish that the error was reasonably calculated to and did lead to the rendering of an incorrect verdict. *Gee v. Liberty Mutual Fire Insurance Co*., 765 S.W.2d 394, 396 (Tex. 1989). The harmless error rule applies. Generally, the appellate courts will not find reversible error based on erroneous evidence rulings where the evidence in question is cumulative and not controlling on a material issue dispositive of the case. *Id*. Thus, if your testimony is excluded, you should make an offer of proof pursuant to Texas Rule of Evidence 103. You should also join

your abuse of discretion point of error with an insufficient/no evidence point as that is the issue upon which the appeal will ult imately turn.

V. REBUTTAL WITNESSES AND THE DUTY TO SUPPLEMENT.

You can use an unidentified/undesignated witness as a rebuttal witness under certain circumstances. If you could not anticipate calling the rebuttal witness prior to trial, then you can call the witness despite the fact that he or she has not been identified. *Gannett Outdoor Co. v. Kubeczka*, 710 S.W.2d 79 (Tex. App.--Houston [14th Dist.] 1986, no writ). However, if the use of the rebuttal witness could have been anticipated prior to trial, then such witness must be identified consistent with Rules 166b(5) and 215(5). *Ramos v. Champlin Petroleum Co.*, 750 S.W.2d 873 (Tex. App.--Corpus Christi 1988, writ denied).